

Index

Customs Bulletin and Decisions
Vol. 40, No. 1, December 28, 2005

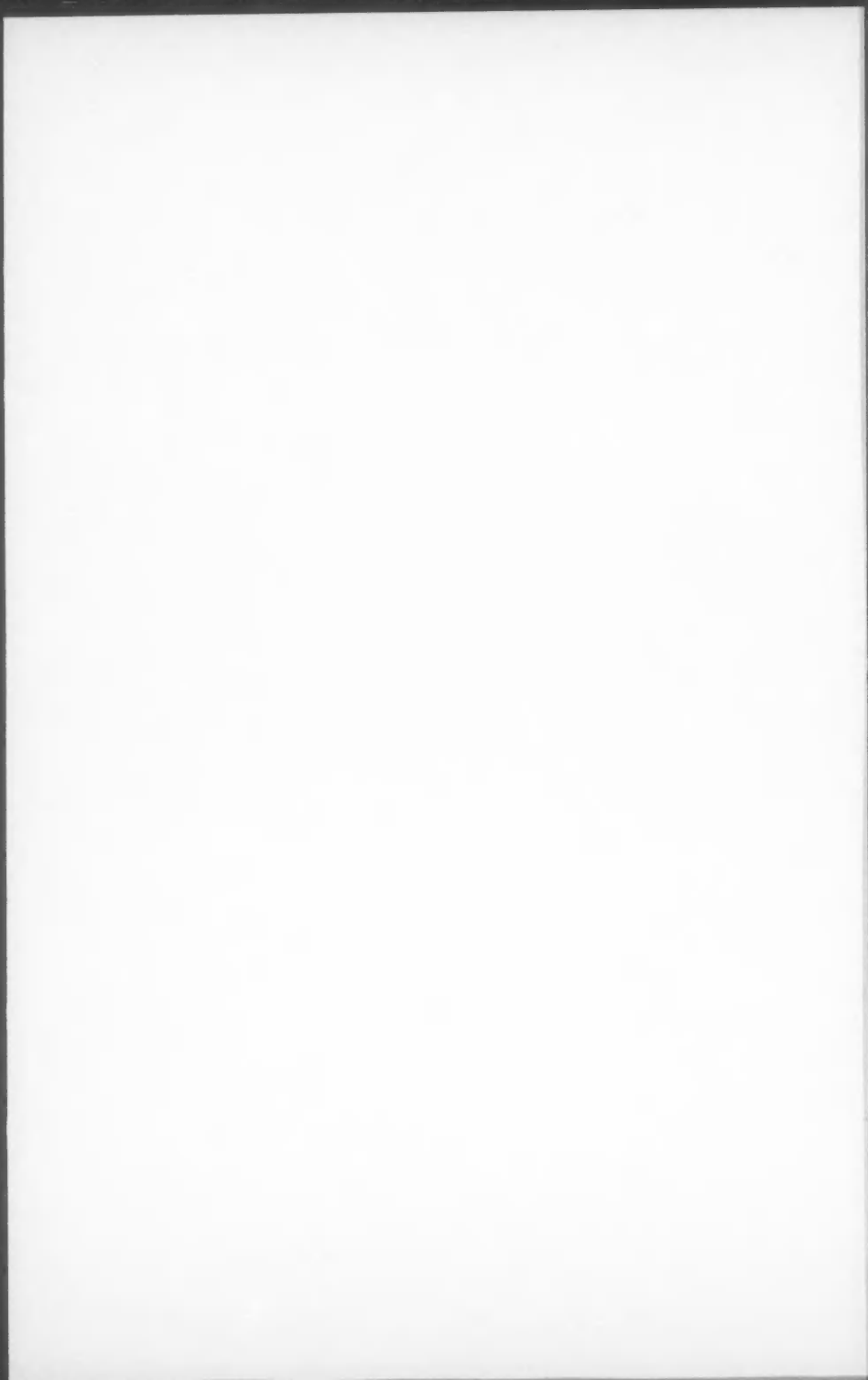
General Notices

Notice of cancellation of Customs broker permit.....	Page 1
Notice of cancellation of Customs broker license.....	2
Notice of cancellation of Customs broker license due to death of the license holder.....	2
Notice of cancellation of Customs broker license.....	3
Agency information collection activities: Harbor Maintenance Fee.....	3

U.S. Court of International Trade

Slip Opinions

Amoco Corporation v. United States.....	Slip Op. No. 05-156	Page 9
---	------------------------	-----------



Bureau of Customs and Border Protection

General Notices

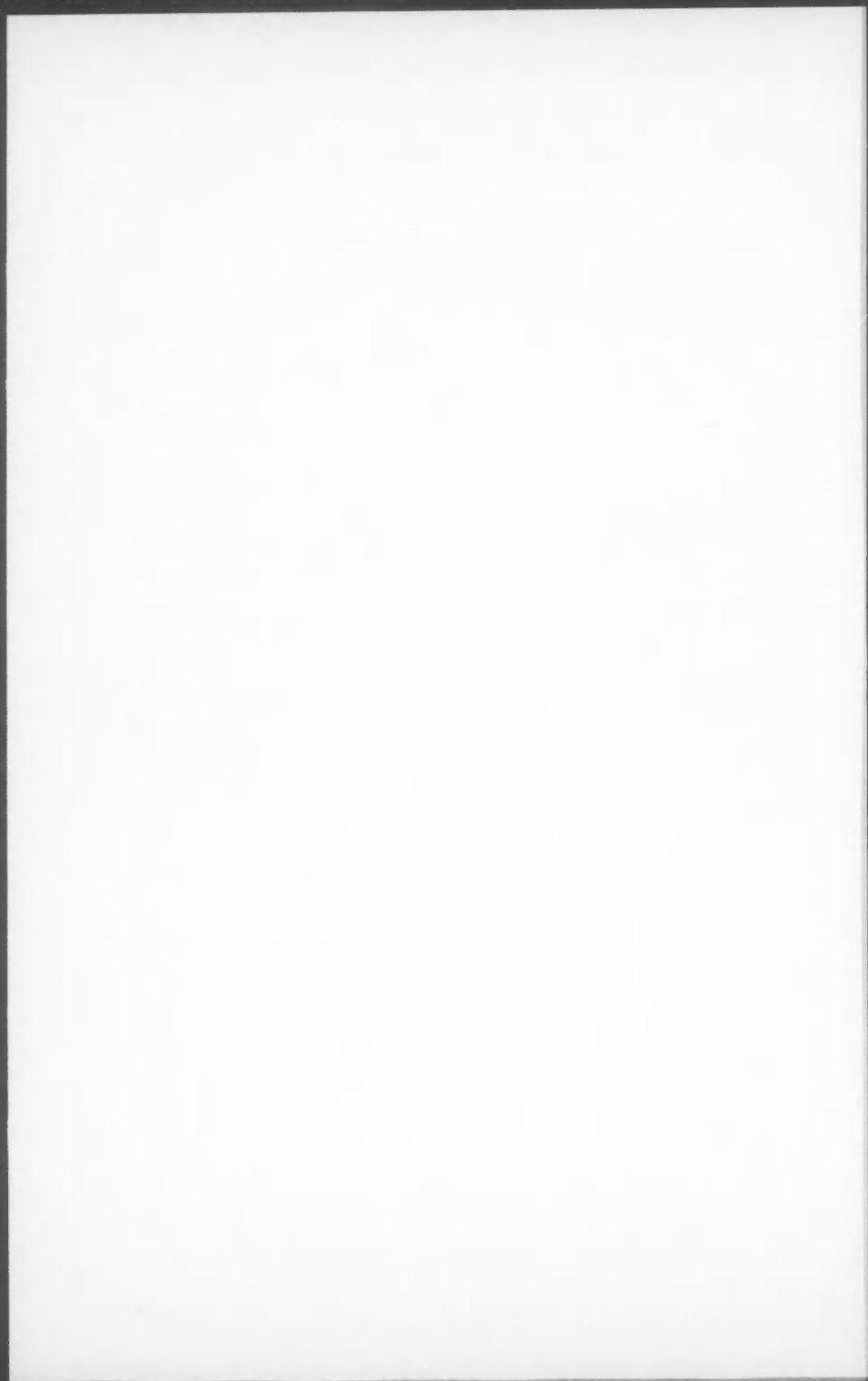
Notice of Cancellation of Customs Broker Permit

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker permits are cancelled without prejudice.

<u>Name</u>	<u>Permit #</u>	<u>Issuing Port</u>
A.P. Champagne Company, Inc.	002	New Orleans
International Freight Forwarders, Inc.	14074	Norfolk
Menlo Worldwide Trade Services, Inc.	14075	Norfolk
Hub Forwarding Company, Inc.	04-0141	Boston
Menlo Worldwide Trade Services, Inc.	04-0016	Boston
Brent D. Powell	04-03-AXE	Boston
Vastera Solutions	04-0158	Boston
Mark K. Neville, Jr.	04-0132	Boston
Brian A. Hill	04-03-BBL	Boston
American Shipping Co., Inc.	04-0155	Boston
Galaxy Customhouse Brokers, Inc.	92103	Los Angeles
Elizabeth Chapman	28-05-BLQ	San Francisco
David Saliba	6416	Dallas
Eric Peterson	26-05-JB7	Nogales
J.L.W. Associates, Inc.	00/17/001	Savannah



<u>Name</u>	<u>Permit #</u>	<u>Issuing Port</u>
Len M. Miyar	52-04-BJJ	Miami
Jorg Berger	4864	San Francisco

DATED: December 6, 2005

JAYSON P. AHERN,
*Assistant Commissioner,
 Office of Field Operations.*

[Published in the Federal Register, December 13, 2005 (70 FR 73783)]

Notice of Cancellation of Customs Broker License

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker license is canceled with prejudice.

<u>Name</u>	<u>License #</u>	<u>Issuing Port</u>
Bernell W. Grizzard	16261	Atlanta

DATED: December 6, 2005

JAYSON P. AHERN,
*Assistant Commissioner,
 Office of Field Operations.*

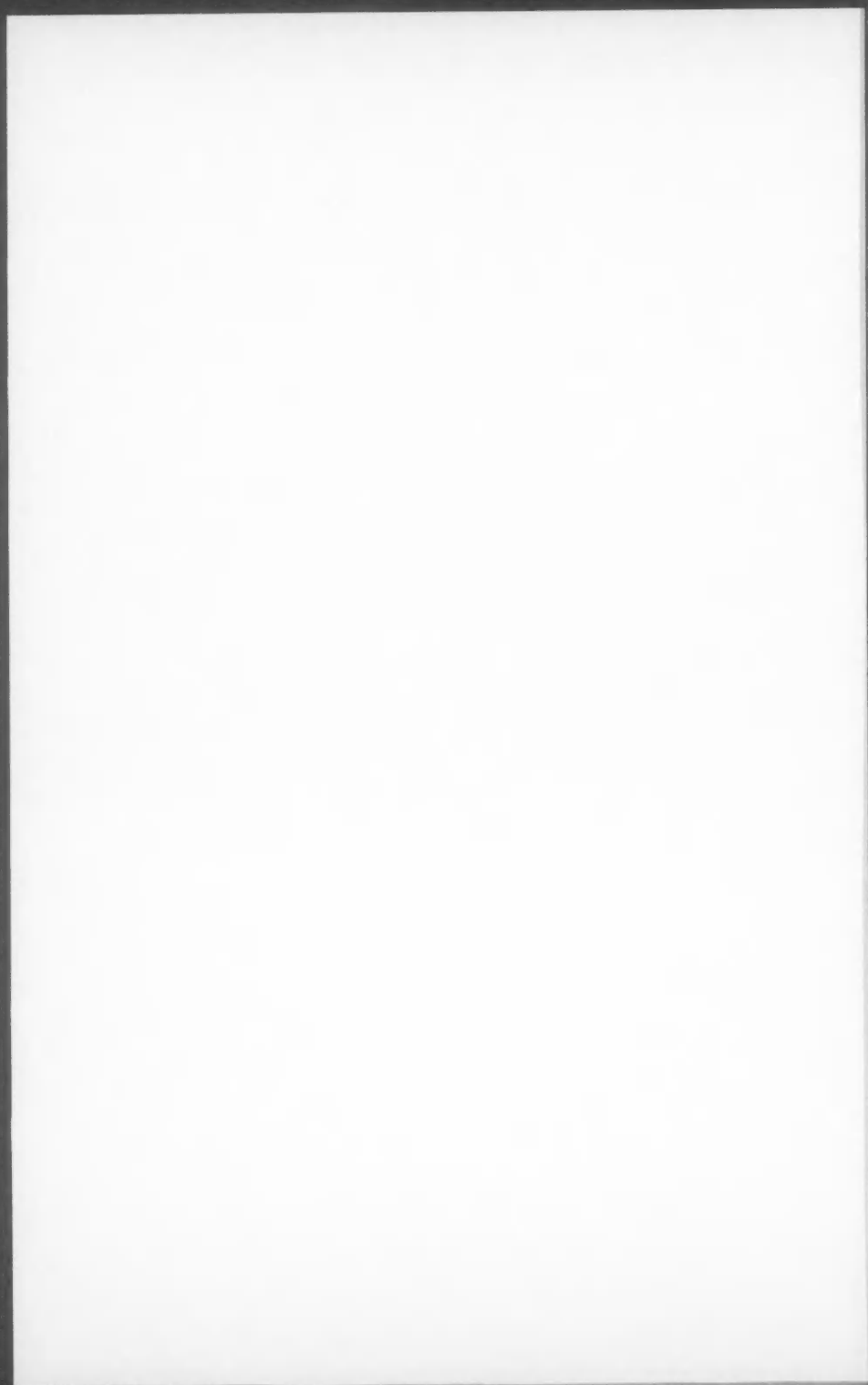
[Published in the Federal Register, December 13, 2005 (70 FR 73783)]

Notice of Cancellation of Customs Broker License Due to Death of the License Holder

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Notice is hereby given that, pursuant to Title 19 of the Code of Federal Regulations § 111.51(a), the following individual Customs broker licenses and any and all permits have been cancelled due to the death of the broker:



<u>Name</u>	<u>License #</u>	<u>Port Name</u>
Gaspar F. Torres	21062	Otay Mesa
Nicholas E. Vacakis	3621	San Francisco

DATED: December 6, 2005

JAYSON P. AHERN,
*Assistant Commissioner,
 Office of Field Operations.*

[Published in the Federal Register, December 13, 2005 (70 FR 73784)]

Notice of Cancellation of Customs Broker License

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker licenses are cancelled without prejudice.

<u>Name</u>	<u>License #</u>	<u>Issuing Port</u>
Diaz & Flores, Inc.	21823	San Juan
A.P. Champagne Company, Inc.	10194	New Orleans
Richard L. Writsman	20472	Los Angeles
N.I. Logistics American Corporation	20580	Portland

DATED: December 6, 2005

JAYSON P. AHERN,
*Assistant Commissioner,
 Office of Field Operations.*

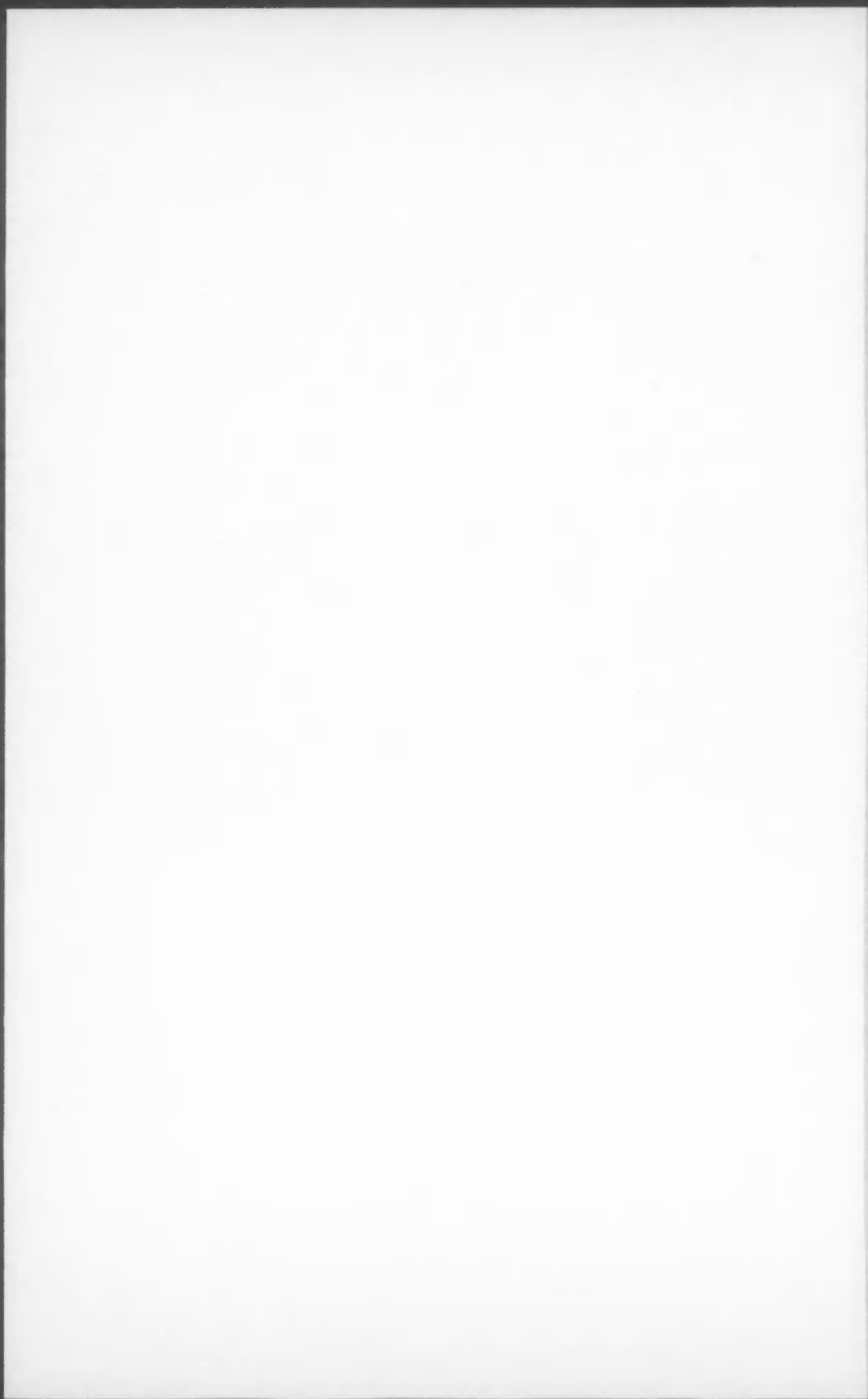
[Published in the Federal Register, December 13, 2005 (70 FR 73783)]

HARBOR MAINTENANCE FEE

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the follow-



ing information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Harbor Maintenance Fee. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (70 FR 58458) on October 6, 2005, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 11, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395-7285.

SUPPLEMENTARY INFORMATION:

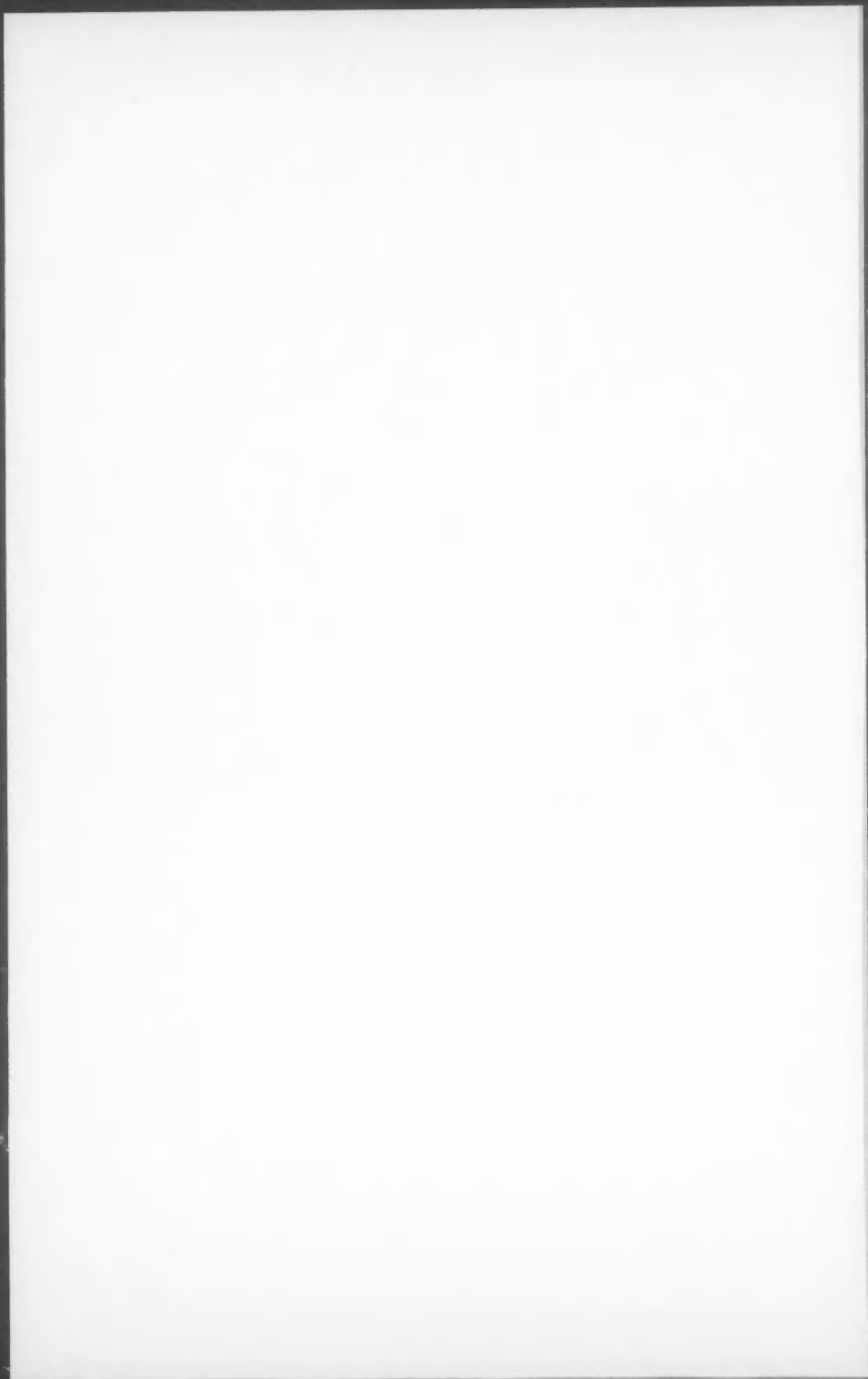
The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104-13). Your comments should address one of the following four points:

- (1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Harbor Maintenance Fee

OMB Number: 1651-0055

Form Number: Forms 349 and 350



Abstract: This collection of information will be used to verify that the Harbor Maintenance Fee paid is accurate and current for each individual, importer, exporter, shipper, or cruise line.

Current Actions: This submission is being submitted to extend the expiration date with a change to the burden hours.

Type of Review: Extension (with change)

Estimated Number of Respondents: 5,200

Estimated Time Per Respondent: 40 minutes

Estimated Total Annual Burden Hours: 2,816

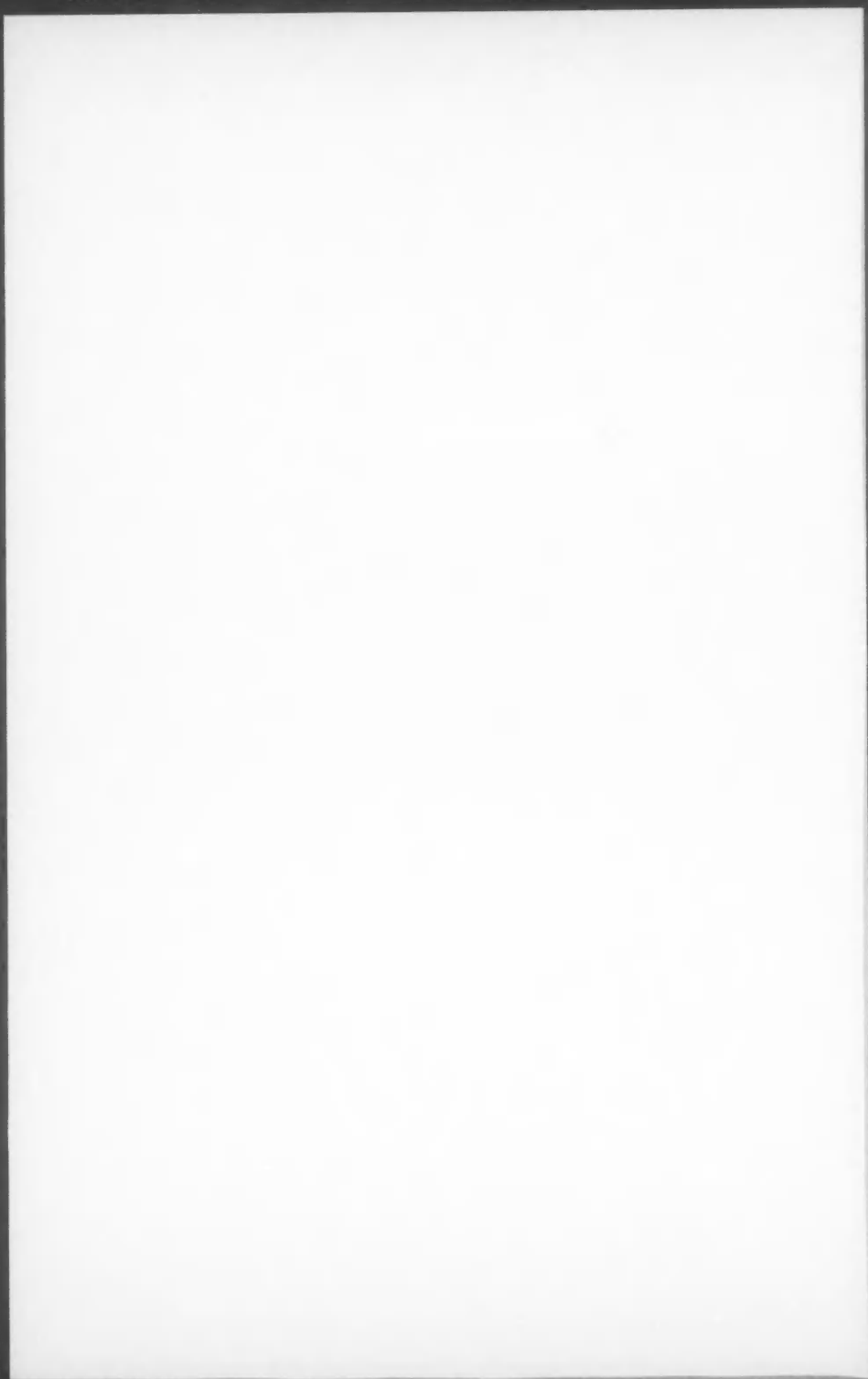
Estimated Total Annualized Cost on the Public: \$42,240

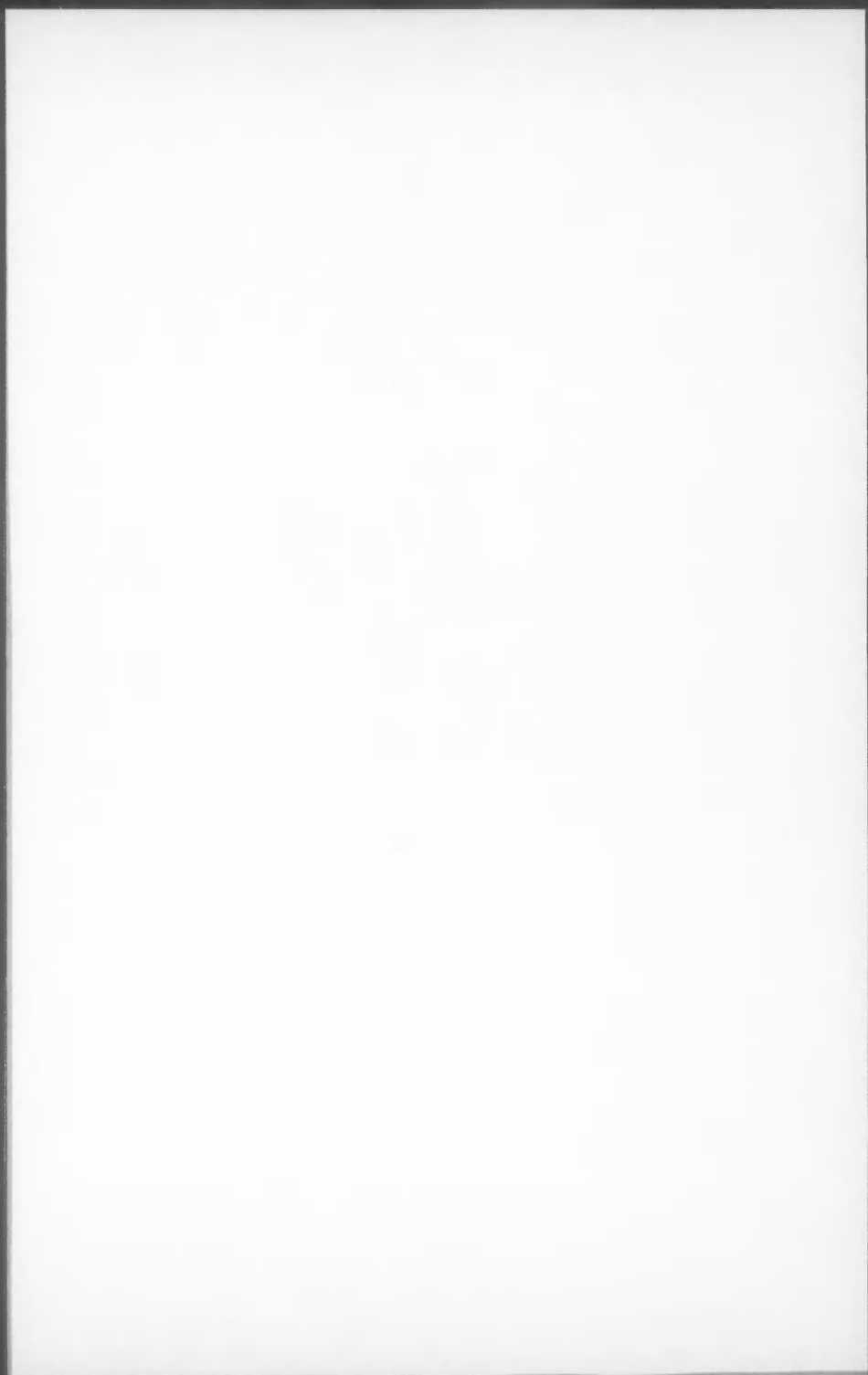
If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202-344-1429.

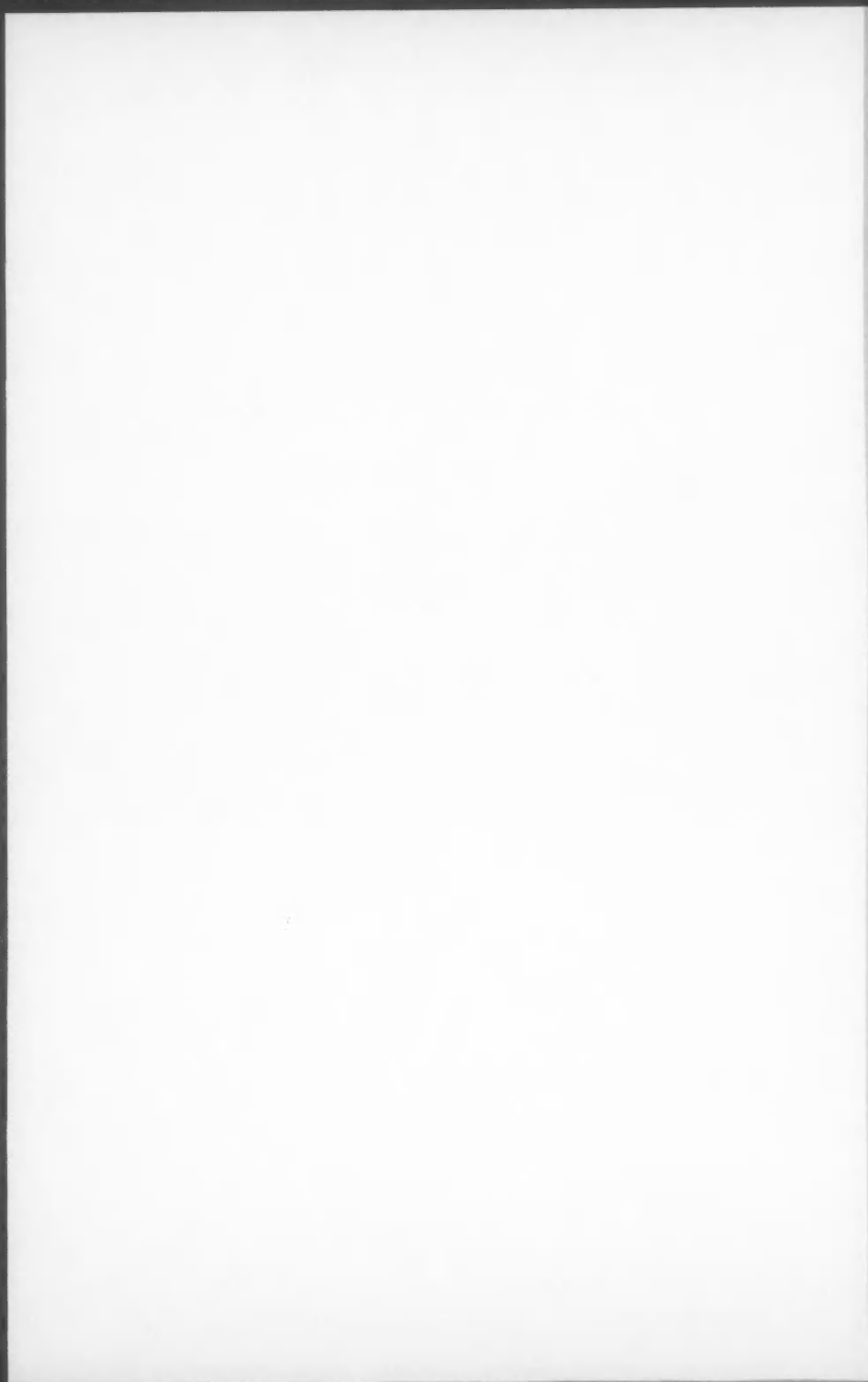
Dated: December 5, 2005

TRACEY DENNING,
*Agency Clearance Officer,
Information Services Branch.*

[Published in the Federal Register, December 12, 2005 (70 FR 73478)]







Decisions of the United States Court of International Trade

Slip Op. 05-156

AMOCO CORPORATION, *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 99-00399

[Plaintiff's motion for summary judgment is granted and Defendant's cross-motion is denied, except as to certain claims which are dismissed on Defendant's cross-motion.]

Decided: December 9, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (Steven P. Florsheim and Robert F. Seely), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); *Michael Heydrich*, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

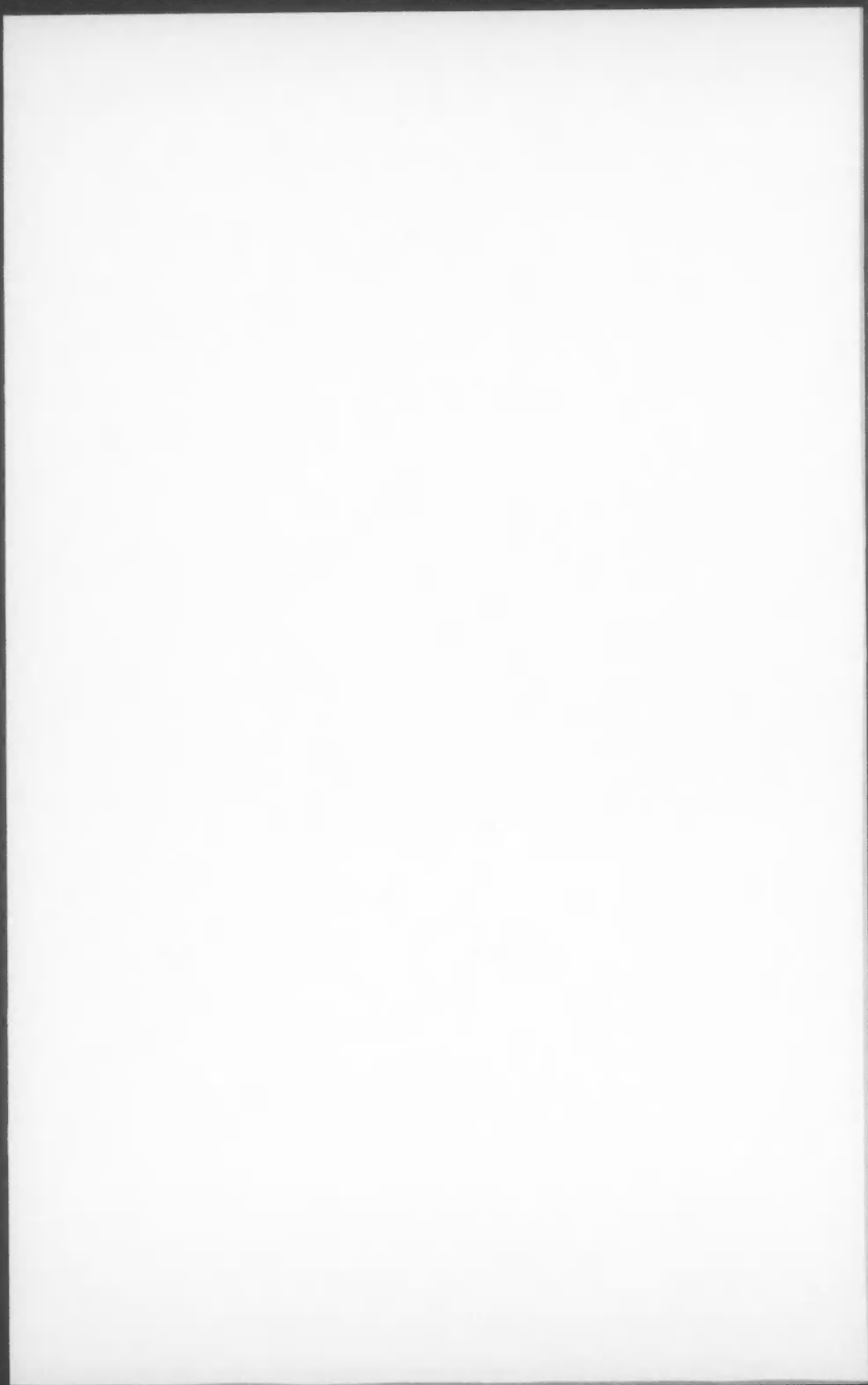
RIDGWAY, Judge:

In this action, Plaintiff Amoco Corporation challenges the denial by the U.S. Customs Service¹ ("Customs") of its protest of Customs' classification of 30 entries covering 19 different but similar epoxy molding compounds ("EMCs") imported from 1995 to 1997.²

Amoco contends that the EMCs are classifiable as "epoxide resins in primary forms," under subheading 3907.30.00 of the Harmonized

¹ Effective March 1, 2003 the U.S. Customs Service was renamed the Bureau of Customs and Border Protection of the U.S. Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296 § 1502, 2002 U.S.C.C.A.N. (116 Stat. 2135, 2308).

² Amoco's Complaint also challenged the classification of a compound identified as "Plaskeen Melamine." See Complaint ¶ 4. However, Amoco expressly abandoned that challenge in its opening brief. See Pl.'s Brief at 1 n.1. The issue therefore warrants no further consideration.



Tariff Schedule of the United States³ ("HTSUS"), dutiable at a rate of 6.1% *ad valorem*. See generally Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Brief"); Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Response Brief"). However, Customs classified the merchandise under HTSUS subheading 3824.90.28,⁴ covering "[m]ixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances: [o]ther," subject to a higher rate of duty.⁵ See generally Defendant's Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Brief"); Defendant's Reply Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Response ("Def.'s Reply Brief").

Cross-motions for summary judgment are pending. Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994).

For the reasons detailed below, the EMCs at issue are properly classified as "epoxide resins in primary forms," under subheading 3907.30.00 of the HTSUS. Amoco's motion for summary judgment is therefore granted – and the Government's cross-motion is denied – except as to certain claims discussed in section II below, which are dismissed on the Government's cross-motion.

I. Background

A. Epoxy Molding Compounds ("EMCs") in General

The epoxy molding compounds ("EMCs") in this action are used to protect delicate integrated circuits. In a sense, they are used to create small protective packages around the circuitry. The packaging

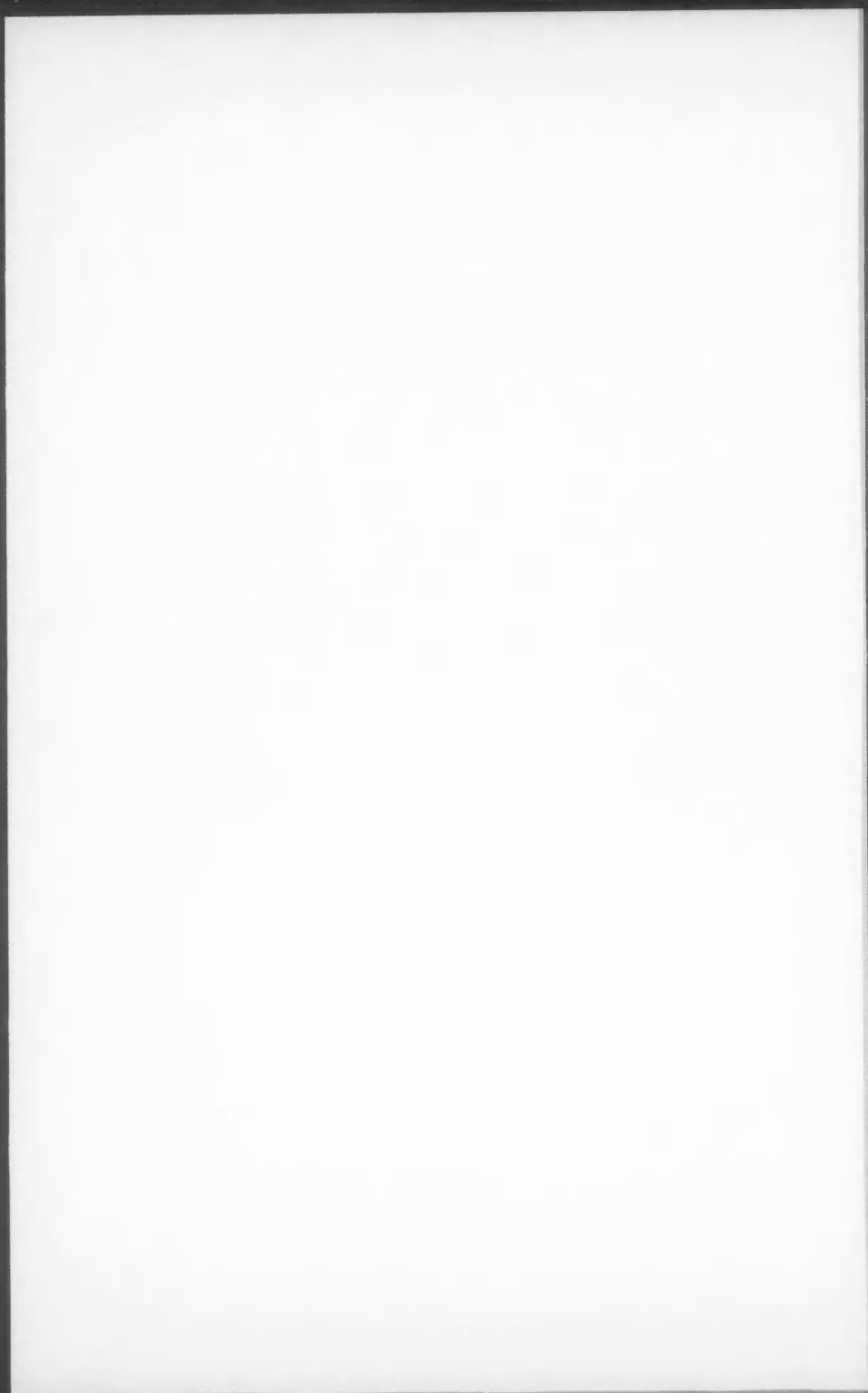
³ Subheading 3907.30.00, HTSUS, covers: "Polyacetals, other polyethers and epoxide resins, in primary forms; polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms: [e]poxide resins."

⁴ The subheading under which Customs classified the EMCs was re-numbered in 1996 – from subheading 3823.90.28 (1995) to subheading 3824.90.28 (1996 & 1997). See Plaintiff's Statement of Material Facts Not in Issue ("Pl.'s Statement") ¶ 2. However, the heading and subheading text remained the same at all relevant times. Compare HTSUS heading 3823 (1995), with HTSUS heading 3824 (1996 & 1997).

As an alternative to subheading 3907.30.00, Amoco proposed classification under another subheading of Chapter 38, which was also re-numbered in 1996 – from subheading 3823.90.39 (1995) to subheading 3824.90.39 (1996 & 1997). See Pl.'s Statement ¶ 4. Again, however, the text of the heading and subheading remained the same.

For the sake of convenience, all references herein to heading 3824 (and subheadings thereunder) include both heading 3823 (1995) and 3824 (1996 & 1997).

⁵ Although the text of subheadings 3823.90.28 and 3824.90.28 remained the same, the duty rate changed over time – from 12.9% *ad valorem*, plus 3.3¢ per kilogram in 1995; to 12.2% *ad valorem*, plus 3¢ per kilogram in 1996; to 11.5% *ad valorem*, plus 2.6¢ per kilogram in 1997.



process is – at least in theory – relatively straightforward. The molding compound is heated until it liquefies. It is then poured into a mold containing the integrated circuit. As the compound cools, it hardens, forming a plastic coating – a cocoon – around the circuitry, protecting it from corrosion and other degrading processes, and minimizing the effects of heat, physical shock, and other environmental stresses.⁶

Epoxyes are ideal for protecting integrated circuits. They are strong, shrink little during the curing process, adhere well, are chemical- and corrosion-resistant, and have superior electrical properties. Even with this combination of properties, however, epoxyes alone are not used to encapsulate integrated circuits, because epoxyes have low thermal conductivity and a high coefficient of thermal expansion. EMCs therefore contain other substances that help protect both the resin and the heat-sensitive integrated circuits from the heat generated during the curing process.⁷

Silica and quartz are two of the other substances added to complement the qualities of epoxyes.⁸ In common parlance, silica and quartz are generally considered “fillers.” Silica protects the integrated circuits by dissipating heat, increasing thermal conductivity and strength, and decreasing the coefficient of thermal expansion of the epoxyes. Quartz enhances impact-resistance and inhibits the cracking of the resin during the curing process.⁹

B. The Composition of the EMCs At Issue

As set forth in section III below, much of the Government's case focuses on the specific composition of the EMCs at issue here. The epoxy resin powders in these ECMs typically range from 15% to 20% by weight, but may constitute as much as 25%.¹⁰ Silica and quartz

⁶ See Pl.'s Brief at 6 (citing *Encyclopedia of Semiconductor Technology* 195 (Martin Grayson ed., John Wiley & Sons 1984)). See also Pl.'s Statement ¶1; Def.'s Response Statement ¶1; Defendant's Response to Plaintiff's Statement of Material Facts Not in Issue (“Def.'s Response Statement”) ¶¶ 8–26; 9 *Kirk-Othmer Encyclopedia of Chemical Technology* 381–82, 751–52 (4th ed. 1996) (submitted as Exhibit 8 to Def.'s Brief; *Hawley's Condensed Chemical Dictionary* 447 (14th ed. 2001); *Kirk-Othmer Concise Encyclopedia of Chemical Technology* 432–33 (1985); *McGraw-Hill Dictionary of Chemistry* 223 (1984).

⁷ See 17 *Kirk-Othmer Encyclopedia of Chemical Technology* 1037; see also *Plastics Technology Handbook* 137–39 (3d ed. 1998); 5 *Encyclopedia of Polymer Science and Engineering* 800–02 (Rev. ed. 1986); *Kirk-Othmer Concise Encyclopedia of Chemical Technology* 474–75; *The Encyclopedia of Basic Materials for Plastics* 174 (1967).

⁸ In addition, the EMCs also contain mixed siloxanes, phenolic and brominated resins, antimony tri- and pentoxide, and acrylic modified styrenic rubber. Request for Admissions ¶¶ 8–28; Def.'s Admission ¶¶ 8–28.

⁹ See, e.g., 5 *Encyclopedia of Polymer Science and Engineering* 801 (table showing effect on coefficient of thermal expansion of adding different fillers – including silica and quartz – to epoxy resin).

¹⁰ The percentage, by weight, of each substance in the EMCs is reported imprecisely. Instead of exact percentages, Amoco reported ranges.

combined range from 60% to 85% by weight. The remaining substances never constitute more of the mixture, by weight, than the epoxy resin. See Request for Admissions ¶ 1; Pl's Statement ¶¶ 5-10; Def.'s Response Statement ¶¶ 5-10.

II. The Scope of Amoco's Appeal

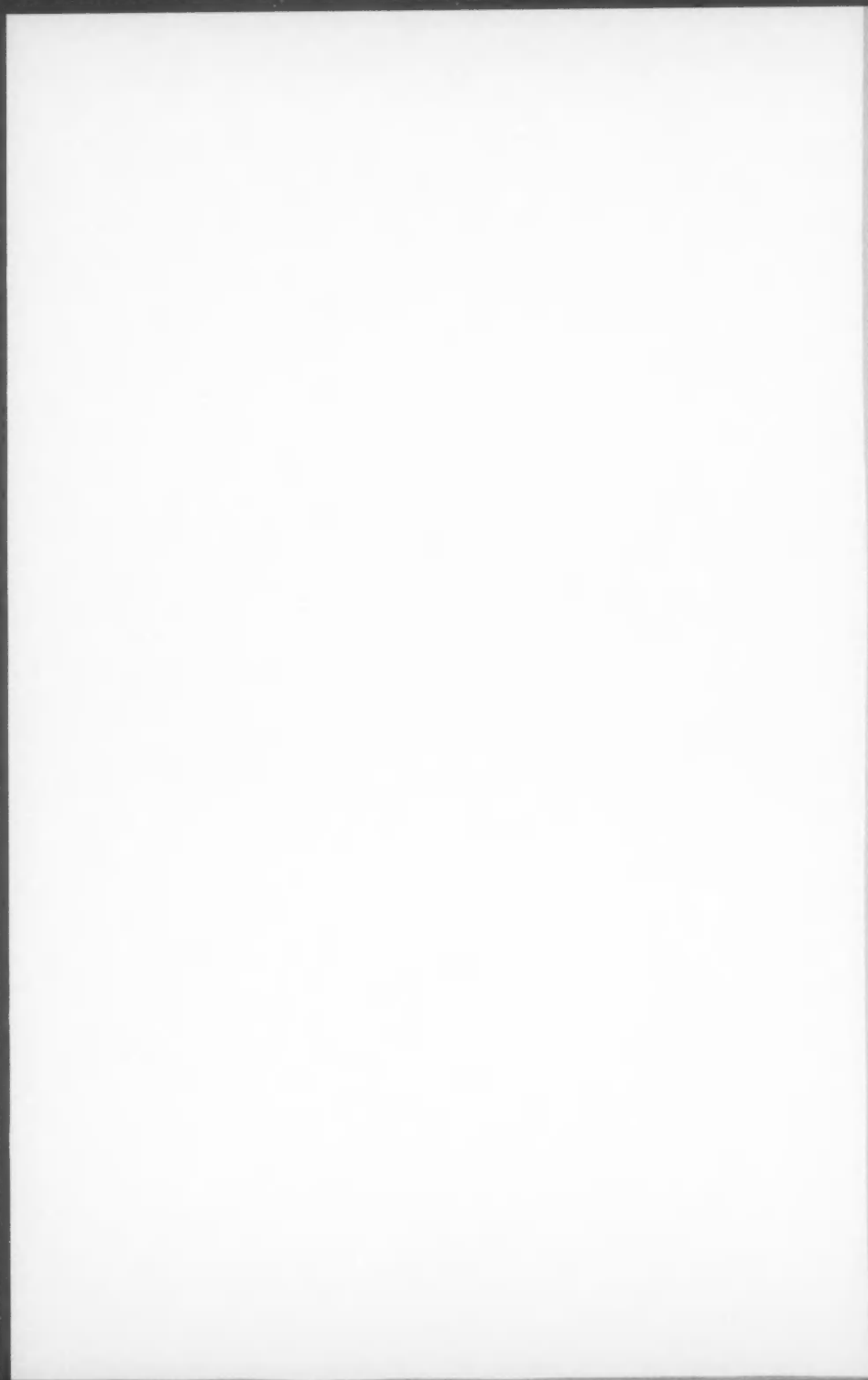
As a preliminary matter, the Government (in effect) moves to dismiss certain of Amoco's claims, asserting that Amoco failed to timely protest Customs' classification of the relevant merchandise. Specifically, the Government contends that Protest Nos. 270496103282 and 270496103297 covered *only* "Plaskon LS-16S" (invoiced as "epoxy molding compound LS-16S"). The Government asserts that Amoco's subsequent letter to Customs advising that the two protests were intended to cover 16 additional EMCs must be rejected as an untimely attempt to amend the company's protests to cover additional merchandise. See Def.'s Brief at 20-21; Letter from Amoco to Customs (Dec. 9, 1996); Pl.'s Brief, Exh. 3 (Protest No. 270496103282); Answer ¶ 4 (averring that the only merchandise covered by two cited protests is "Plaskon LS-16S").

Amoco failed to respond to the Government's challenge in any fashion whatsoever, and is therefore deemed to have abandoned the disputed claims. See, e.g., *Hanig v. Yorktown Central School District*, 384 F. Supp. 2d 710, 723-24 (S.D.N.Y. 2005) (and cases cited there); *Martinez v. Sanders* 2004 WL 1234041 at * 3 (S.D.N.Y. 2004) (and cases cited there). In any event, it appears that Amoco would have had little to say.

A timely-filed protest may be amended by submitting, *inter alia*, "[a] specific description of the merchandise affected by the decision as to which the amendment to the protest is filed." 19 C.F.R. § 174.14(c)(3) (1996). However, amendments are not permitted "after the [90-day] statutory period for filing a protest has run." *J. Ray McDermott & Co. v. United States*, 354 F. Supp. 280, 283 (Cust. Ct. 1972); 19 U.S.C. § 1514(a) (1994); 19 C.F.R. § 174.11-14 (1996). And there can be no argument that Amoco's belated letter did not constitute an "amendment." See generally *Tail Active Sportswear v. United States*, 16 CIT 504, 507-08, 793 F. Supp. 325, 328-29 (1992) (even assuming that purported second page of protest existed, importer alleged only that it referred to "women's lined tracksuits"; thus, it could not have constituted effective protest as to "men's lined tracksuits").

III. Standard of Review

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to . . . judgment as a matter of law." USCIT R. 56(c).



Customs' classification rulings are reviewed through a two-step process: first, construing the relevant tariff headings, which is a question of law; and second, determining whether the merchandise is properly classified under the headings, which is a question of fact. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Thus, in classification cases, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365 (citations omitted).

Here, although the parties argue for different classifications, they agree that there are no genuine disputes of material fact. See Plaintiff's Motion for Summary Judgment at 2; Defendant's Motion for Summary Judgment at 1. The case is therefore ripe for summary judgment.

While Customs' classification rulings do not merit *Chevron* deference, they are entitled to "a respect proportional to [their] 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "That power to persuade depends on the thoroughness evident in the classification ruling, the validity of its reasoning, its consistency with earlier and later pronouncements, the formality attendant the particular ruling, and all those factors that give it power to persuade." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (footnote omitted) (citations omitted).

IV. Analysis

A. HTSUS Heading 3907

Amoco asserts that the EMCs at issue are properly classified under heading 3907 of the HTSUS – specifically, subheading 3907.30.00. HTSUS heading 3907 covers:

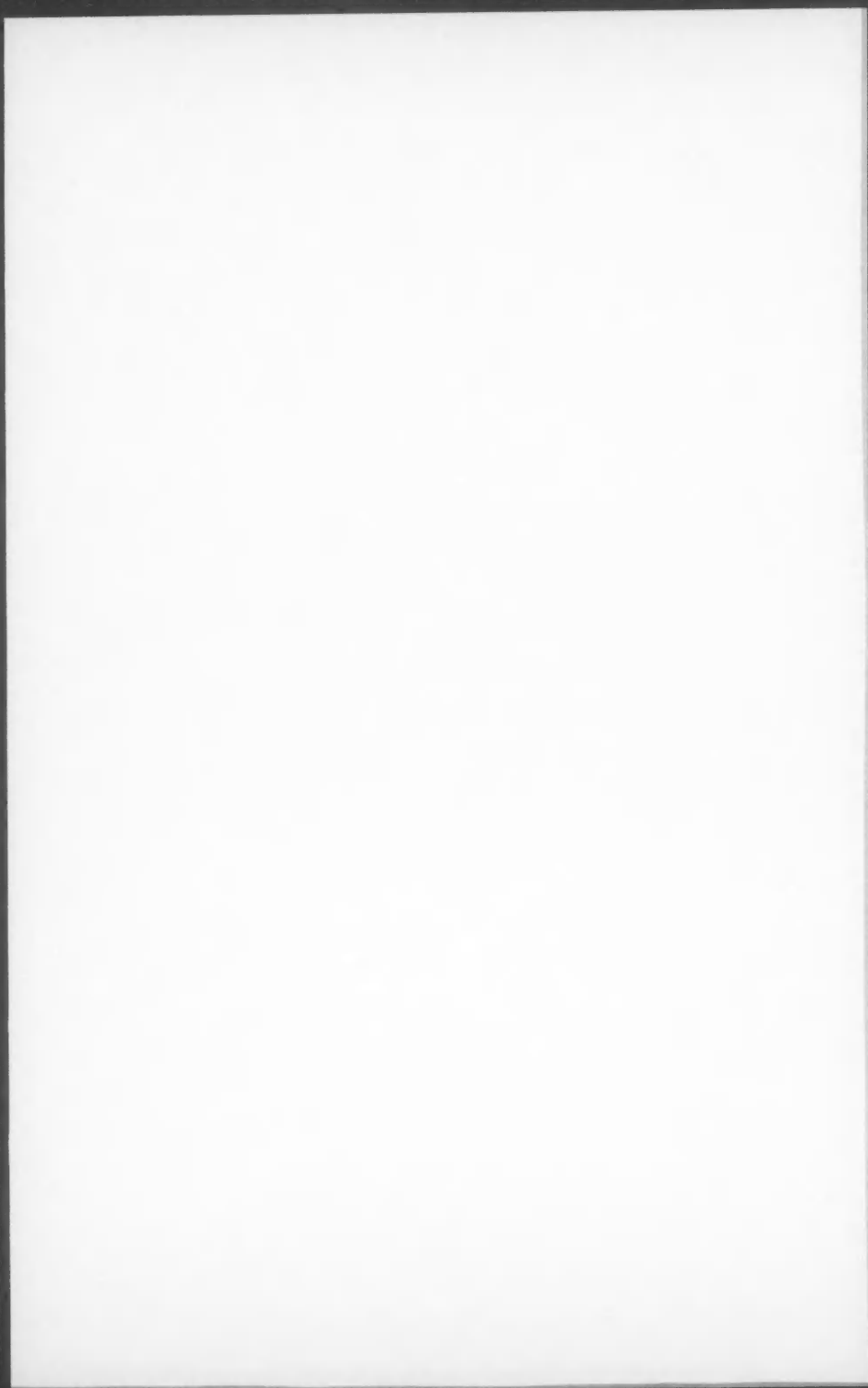
Polyacetals, other polyethers and *epoxide resins, in primary forms*; polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms:

... *Epoxide resins*

3907.30.00, HTSUS (emphases added).

"Epoxides" refer to a chemical composition commonly called "epoxy," and characterize epoxy resins.¹¹ The parties agree that the EMCs here contain epoxy resins. The parties also agree that those

¹¹ See Manas Chanda & Salil K. Roy, *Plastics Technology Handbook*, 688 (Marcel Dekker Inc. 3d ed. 1998) ("Epoxide or epoxy resins contain the epoxide group, also called the epoxy, oxirane, or ethoxyline group").



epoxy resins are the "epoxide resins" specified by name both in heading 3907 and in subheading 3907.30.00. Pl.'s Statement ¶¶ 5,7; Def.'s Response ¶¶ 5, 7.

Where the parties disagree is on whether the epoxide resins here are in "primary form." The Government argues that – due to the quantity and importance of the silica and quartz present in these EMCs – the EMCs are not "epoxide resins in primary forms" but, rather, products "engineered from resins in primary forms." Def.'s Reply Brief at 6. Amoco maintains that the silica, quartz, and other substances added to the resin do not preclude the EMCs' classification as "epoxide resins," because the HTSUS expressly contemplates their presence. Pl.'s Brief at 10–11.

Chapter Note 6 to Chapter 39 of the HTSUS explains that – as used in heading 3907, among others – the term "primary forms" embraces (among other forms) "powders (including moulding powders)." Explanatory Notes, Ch. 39 Note 6 at 590. The parties agree that the EMCs at issue are "molding powders." Pl.'s Brief at 5; Def.'s Brief at 4. The Explanatory Notes to Chapter 39 further explain that "powder[s]" in "primary form" may consist of either "unplasticised materials which become plastic in the moulding and curing process" or "materials to which plasticisers have been added." In either case:

[T]hese materials may incorporate fillers (e.g., wood flour, cellulose, textile fibres, mineral substances, starch), colouring matter or other substances cited . . . above [i.e., substances "such as plasticisers, stabilisers, fillers and colouring matter, chiefly intended to give the finished products special physical properties or other desirable characteristics."]

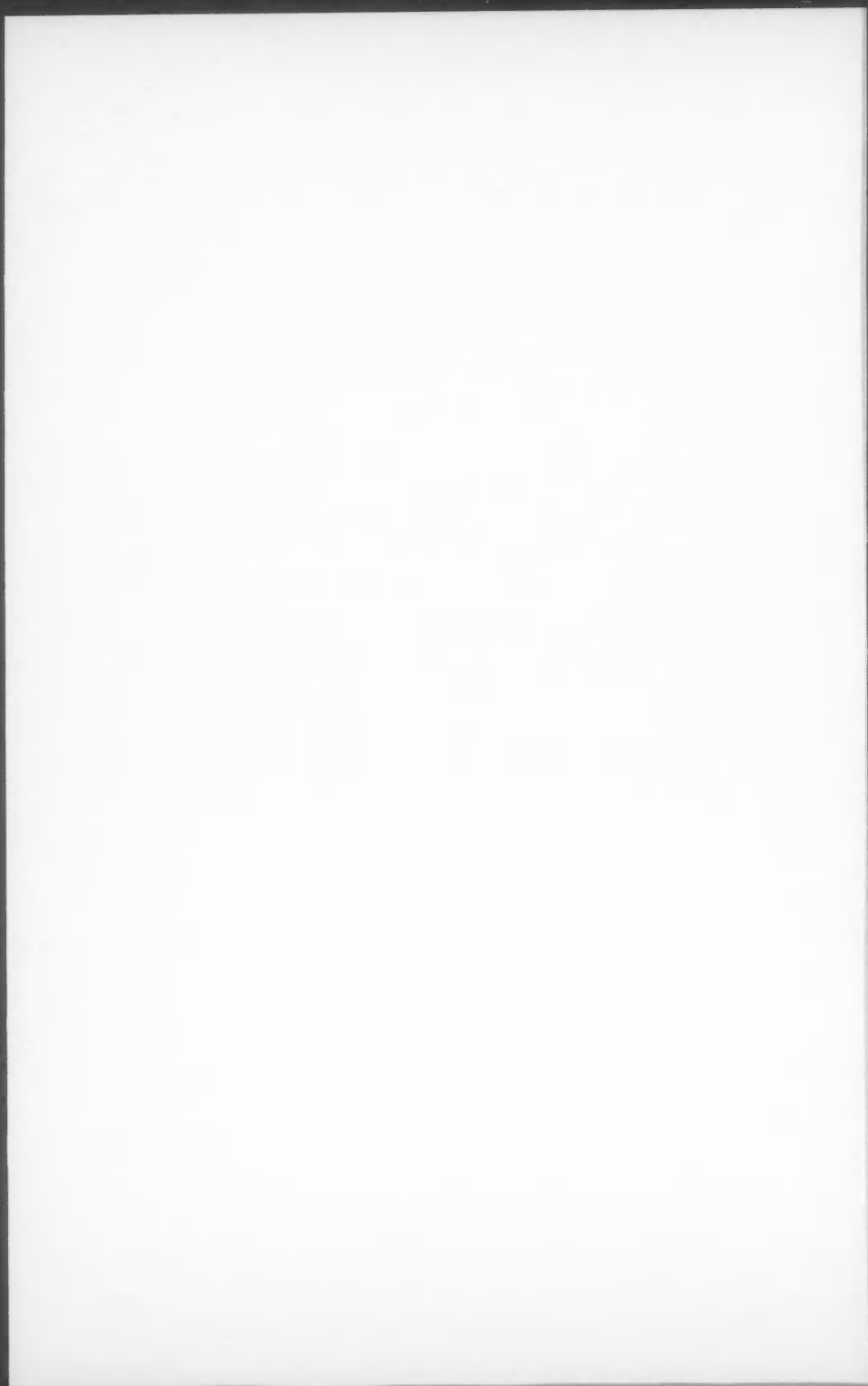
Explanatory Notes, Gen. Note to Ch. 39 at 596–97 (1996) (emphases added).¹²

Thus, as used in heading 3907 and subheading 3907.30.00, the phrase "epoxide resins in primary forms" does not refer only to *pure* resins. The Explanatory Notes expressly contemplate that materials such as fillers, coloring matter, and other substances may be included as well. See Explanatory Notes, Gen. Note to Ch. 39 at 596–97; Pl.'s Brief at 10.

Silica and quartz are "mineral substances," which are identified as permissible "fillers" in the Explanatory Notes. See, e.g., *Polymer Sci-*

¹² The portions of the Explanatory Notes addressed herein are identical in the 1987 and 1996 versions of that document. For the sake of convenience, all references herein are to the 1996 version.

The Explanatory Notes "provide a commentary on the scope of each heading of the [HTSUS] and are thus useful in ascertaining the classification of merchandise under the system." H.R. Conf. Rep. No. 100–576, at 549 (1988), *reprinted in* 1988 U.S.C.A.N. 1547, 1582. "While the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTSUS subheadings." *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995) (internal citations omitted).



ence Dictionary 197 (2d ed. 1997) (noting that silica and quartz are "mineral substances"); Explanatory Notes, Gen. Note to Ch. 39 at 596-97. Moreover, the silica and quartz in the EMCs here at issue increase the durability of the epoxide.¹³ They are therefore "chiefly intended to give the finished product *special physical properties or other desirable characteristics*." See Pl's Brief at 6; Explanatory Notes, Gen. Note to Ch. 39 at 596-97 (emphases added).

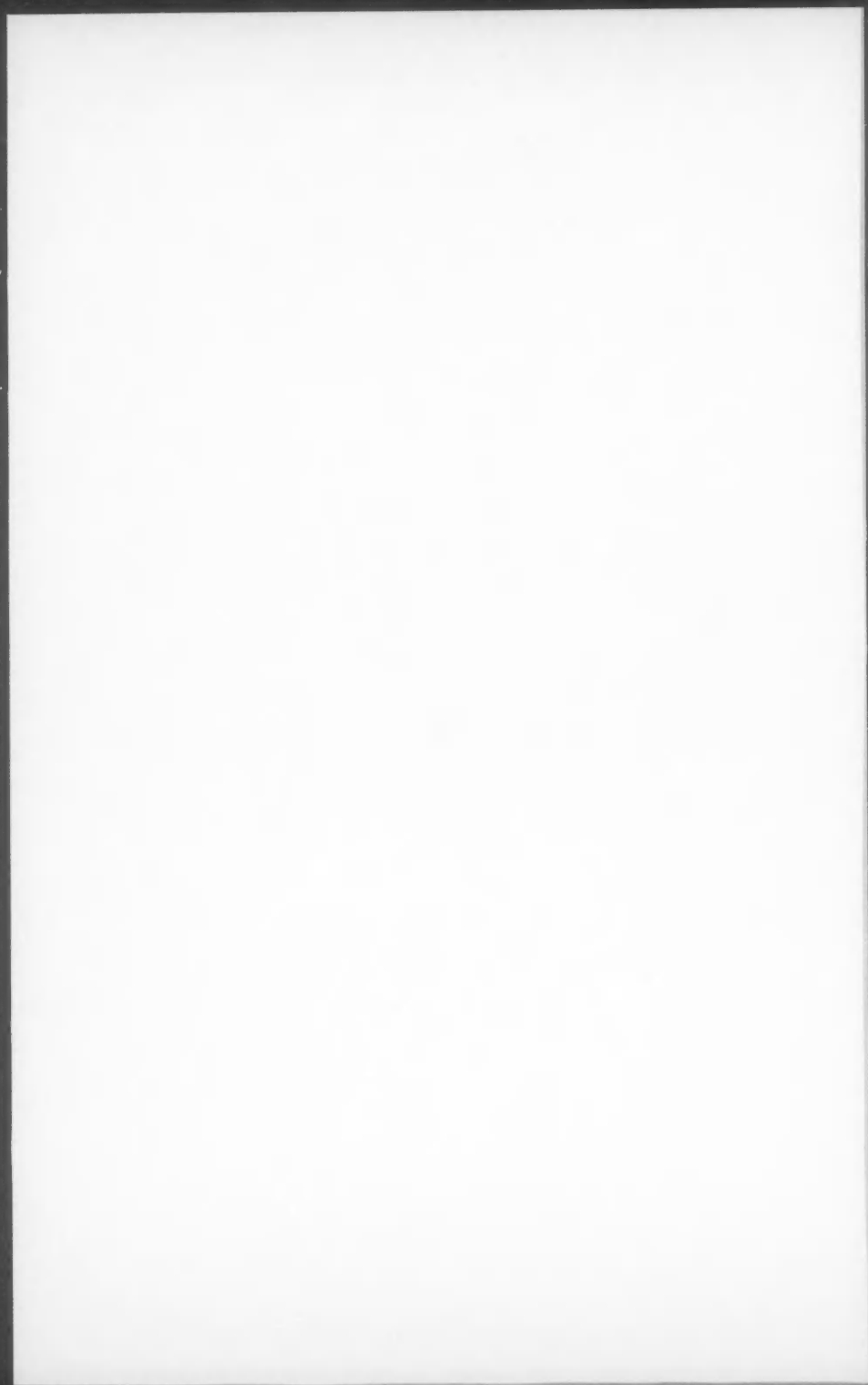
Because they comprise only epoxide resins and other substances expressly permitted by the Explanatory Notes, Amoco concludes that the EMCs at issue are properly classified as "epoxide resins in primary forms" under subheading 3907.30.00. See *Govesan Am. Corp. v. United States*, 25 CIT 1142, 1146, 167 F. Supp. 2d 1374, 1379 (2001) (where other substances added to epoxy resins were accounted for in the Explanatory Notes, resulting compounds were properly classified as "epoxy resins in primary forms" under heading 3907); *Expancel, Inc. v. United States*, 24 CIT 128 (2000) (presence of substance which was functionally a "filler" did not preclude classification of compounds as acrylic polymers in primary forms).

The Government concedes (as it must) that epoxide resins in primary form "may incorporate fillers (e.g., wood flour, cellulose, textile fibers, mineral substances, starch), coloring matters, plasticisers, or stabilizers, chiefly intended to give the finished products special physical properties or other desirable characteristics." Def.'s Brief at 8-9. But the Government protests that the additional substances here "make up the majority of the product by weight and change the properties of the [EMCs] in a desirable manner." *Id.* at 9. The Government therefore dismisses Amoco's asserted classification as "the exception that swallows the rule," and an outcome that "would certainly not be in accord with *Expancel*." *Id.* see also Byington Decl. ¶¶ 16-17 (silicon and quartz not "fillers," because of the "amount and function" in the EMCs).

The Government argues, in essence, that *Expancel* promulgated a new definition of "primary form": Something that "changes the properties of that to which it is added in some desirable manner." See Def.'s Brief at 7 (quoting *Expancel*, 24 CIT at 132 n.5 ("[T]he unifying characteristic found in the Explanatory Notes appears to be that the addition of a primary form product changes the properties of that to which it is added in some desirable manner.")). Def.'s Reply Brief at 5.

Emphasizing that, in the instant case, silica and quartz impart many of the qualities of the EMCs, the Government argues that - under *Expancel* - the silica and quartz *themselves* constitute "primary forms," because they "change[] the properties of that to which [they are] added in some desirable manner." See Def.'s Reply Brief at

¹³ See section I, *supra*.



5, 7. The Government therefore concludes that the EMCs at issue are not epoxide resins in primary form but, instead, are "mixture[s] of several primary constituents, each making its own contribution to the functionality of the product." Def.'s Brief at 7 (citations omitted); see also Def.'s Reply Brief at 8, 11.

The Government, however, fails to reconcile its reading of *Expancel* with the plain language of the Explanatory Notes (quoted above). Nor can it do so. By their very terms, the Explanatory Notes expressly contemplate that a "primary form" may include "fillers" and other substances – and that those "fillers" and other substances may impart "special physical properties or other desirable characteristics." Explanatory Notes, Gen. Note to Ch. 39 at 596–97. To the extent that the Government reads *Expancel* to hold that classification of a compound as a "primary form" is precluded by the presence of substances imparting "special properties or other desirable characteristics," that reading cannot be sustained.¹⁴ Indeed, even where such substances are essential components or "necessary ingredients," compounds are nevertheless classifiable as epoxide resins "in primary forms." See *Govesan*, 25 CIT at 1146, 167 F. Supp. 2d at 1379 (emphasis added). In short, the Government's emphasis on the importance of the silica and quartz is unavailing.

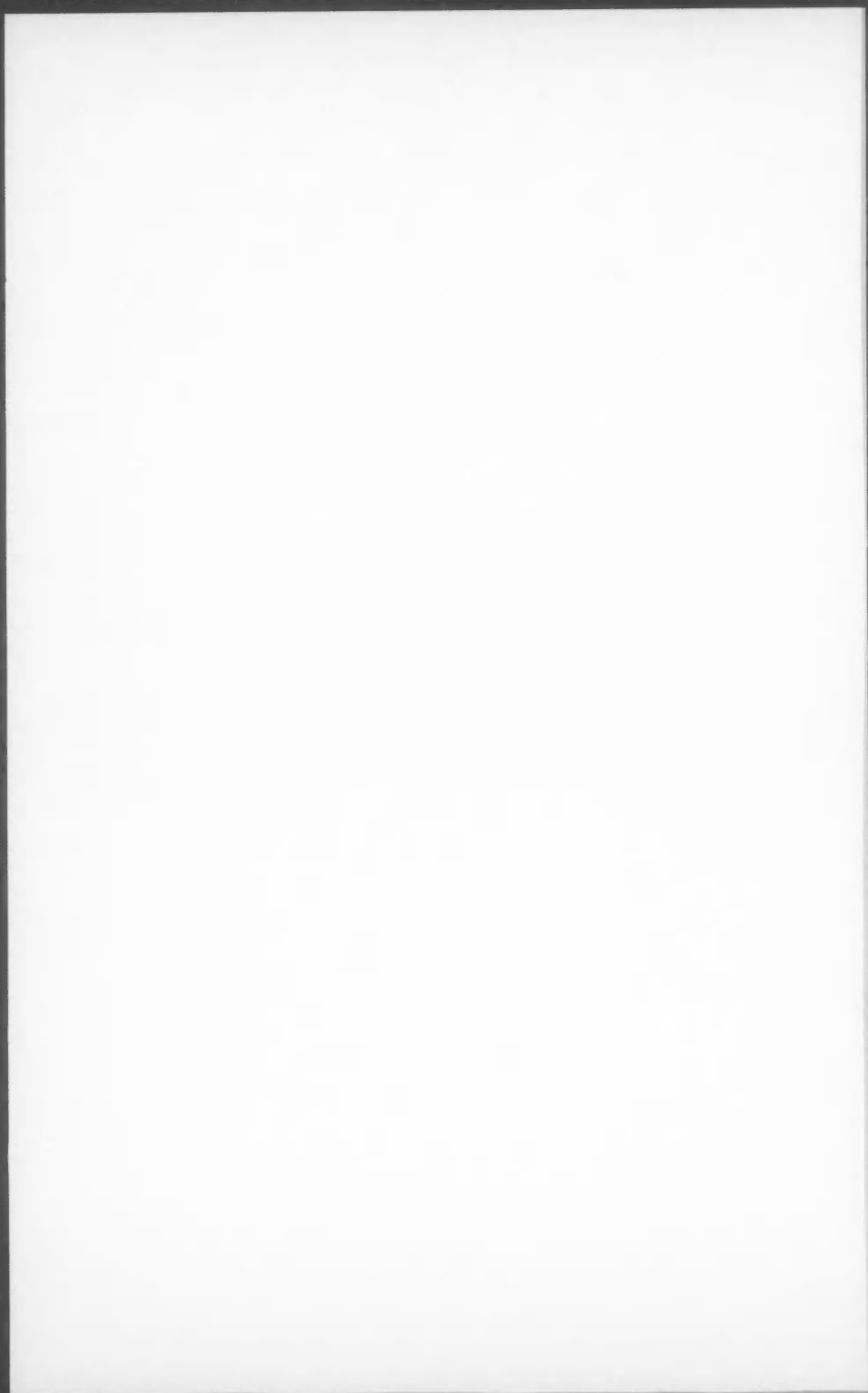
The Government's focus on the quantity of silica and quartz in the EMCs is similarly lacking in merit. See, e.g., Def.'s Brief at 9 (emphasizing that "additional substances make up the majority of the product by weight").¹⁵ Indeed, the Government appears to beat a retreat from that argument in its reply brief.¹⁶

In any event, contrary to the Government's implication, the Explanatory Notes to Chapter 39 do not define or limit in terms of their weight or value (vis-a-vis the goods as a whole) either the "fillers" or the "other material chiefly intended to give the finished products

¹⁴ There is, moreover, a fundamental flaw in the Government's logic. It may well be true that – as *Expancel* seems to suggest – all "primary form" products change the properties of that to which they are added in some desirable manner. But, contrary to the Government's claims, it does not follow that all substances that change the properties of that to which they are added in some desirable manner are necessarily "primary form" products. (All cats are animals; but not all animals are cats.)

¹⁵ See also Def.'s Brief at 9 (asserting that epoxide resins "constitute only a minor portion of the products by weight – approximately 7% to 25%," and that the EMCs "contain 60–85% silica and quartz"), 10 (arguing that "resins never constitute as much as 50% of the compounds by weight, do not constitute the single largest component of the merchandise, and frequently constitute only a minor portion of the product").

¹⁶ See Def.'s Reply Brief at 7 (arguing that Amoco misstated the Government's argument, and asserting that the Government never claimed that – to constitute a "primary form" – the epoxy resin "would have to predominate by weight"). But see Def.'s Brief at 11 ("Moreover . . . the imported mixtures are not epoxide resins because resins make up less than fifty percent of the merchandise by weight.").



special physical properties or other desirable characteristics."¹⁷ See Pl.'s Response Brief at 5.¹⁸

The Government attempts to make its case on this point by *reductio ad absurdum*, asserting that "Amoco essentially argues that as long as there is *some* epoxide resin in primary form in a mixture, then the entire mixture is classifiable as an epoxide resin in primary form." See Def.'s Brief at 11 (emphasis added). The Government maintains that "under Amoco's reasoning, there appears to be no point at which the epoxide resins become *de minimis*." *Id.*

But the case postulated by the Government is one for another day. There is no claim here that Amoco added some infinitesimally minuscule quantity of epoxide resin to its EMCs for the sole purpose of staking a claim to classification as "epoxide resins in primary form" under heading 3907. In any event, it appears that the Government's doomsday scenario is anticipated and addressed by the Explanatory Notes, which impose a *qualitative* limit on the on the extent of "fillers" or "other materials" permissible in "epoxy resins in primary forms":

When as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are *excluded* from Chapter 39.

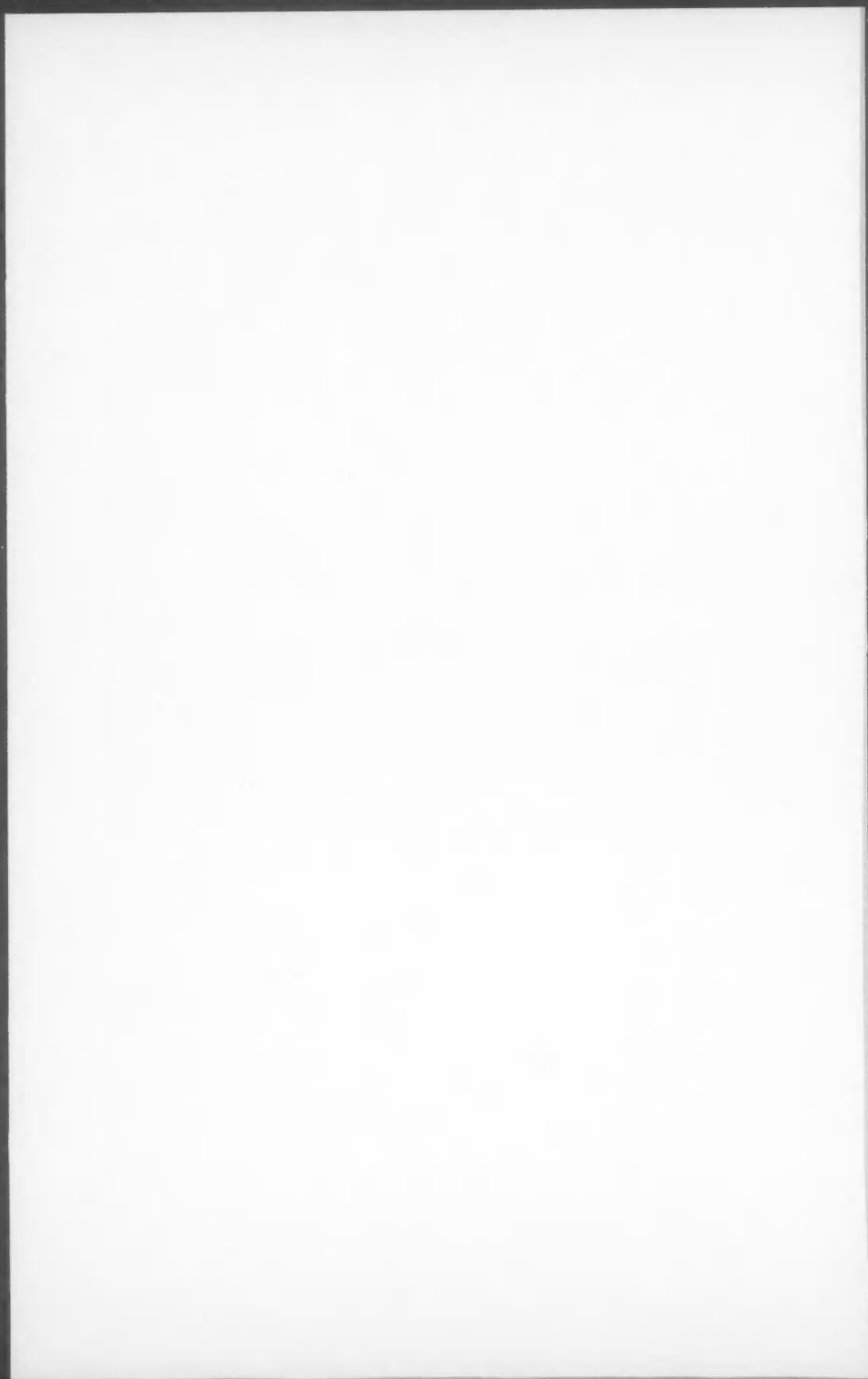
¹⁷The Government's own authorities recognize, for example, that molding powders can incorporate silica "fillers" of as much as 73% by weight, and yet still constitute "primary forms" under the HTSUS. See 9 *Kirk-Othmer Encyclopedia of Chemical Technology* 382, 751; 17 *Encyclopedia of Chemical Technology* 1038.

The Government's authorities thus refute any notion that "fillers" and other such substances must, by definition, constitute a relatively low percentage of a compound's weight. The Kirk-Othmer Encyclopedia specifically states that over 70% silica filler can reduce the thermal coefficient of expansion in integrated circuitry. See *id.* 382 (emphasis added). It also describes a common system for encapsulation with epoxy resins "heavily (60-65 wt %) filled with silica fillers." *Id.* at 752 (emphasis added). Another volume explains that a "typical crystalline silica-filled molding compound" would incorporate 73% by weight silica filler. 17 *Kirk-Othmer Encyclopedia of Chemical Technology* 1038 (emphasis added).

The imposition of any specific quantitative limit could have the unintended effect of eliminating many of the molding powders that are specifically intended to be classified under heading 3907. HTSUS Ch. 39 n.6(b); Explanatory Notes Gen. Note to Ch. 39 at 597.

In contrast, quantitative limits have been imposed elsewhere in the Explanatory Notes to Chapter 39. Specifically, the General Notes to that chapter expressly provide that - with respect to certain solutions - "when the weight of the solvent exceeds 50% of the weight of the solution," the solutions are "excluded from . . . Chapter [39] and fall in heading 32.08." See Explanatory Notes, Gen. Note to Ch. 39 at 596-97 (emphasis added).

¹⁸In its brief, the Government attempts to rely on *Govesan* to support a limit on "fillers" at 50% by weight. See Def.'s Brief at 10-11 ("[U]nder the reasoning of *Govesan*, . . . the imported mixtures are not epoxide resins because resins make up less than fifty percent of the merchandise by weight."). However, that section of *Govesan* is specifically addressing whether the merchandise there at issue was "principally" of plastics - not whether the merchandise was "epoxide resins in primary forms."



B. *Customs Ruling HQ 961071*

The Government asserts that *Skidmore* deference should be accorded Customs' ruling rejecting Amoco's proposed classification under heading 3907 and classifying the EMCs under subheading 3824.90.28 instead. See Def.'s Brief at 6. That ruling, however, includes no substantive analysis of whether the imported merchandise could be classified under heading 3907. In three lines, Customs dismissed the heading, with no indication that the agency even considered Amoco's arguments:

Based on analysis of the merchandise . . . Plaskon does not constitute a plastic in primary forms. Rather, it is a mixture of several primary constituents, each making its own contribution to the final product. Therefore, the merchandise is not classified in subheading 3907.30, HTSUS, for epoxide resins in primary forms.

HQ 961071 (original emphasis omitted).

Customs' ruling includes no discussion of "molding powders" or "fillers," no discussion of the agency's position on the difference between "fillers" and "primary constituents," no analysis of when a "filler" becomes a "primary constituent," no explanation as to the agency's position on appropriate quantities of "fillers" in "epoxy resins in primary forms," and no discussion of permissible end uses of "epoxide resins in primary forms." Further, Customs made no mention of the applicable Notes or the relevant case law. Under such circumstances, Customs' ruling is entitled to no deference.

C. *HTSUS Heading 3824*

Because the EMCs at issue are classifiable under heading 3907, they cannot be classified under heading 3824. Heading 3824 covers "chemical products and preparations . . . *not elsewhere specified or included*." (Emphasis added.) Thus, on its face, heading 3824 applies only if the imported merchandise is not classifiable under any other heading. See e.g., *Lynteq, Inc. v. United States*, 976 F.2d 693, 698-99 (Fed. Cir. 1992) (explaining that, if an item is expressly provided for

¹⁹This "qualitative" limit imposed by the Explanatory Notes is listed under the section titled "Primary forms," and specifically under the caption "Liquids and pastes." See Explanatory Notes, Gen. Note to Ch. 39 at 596-97. Its reasoning, however, extends to "[p]owders, granules and flakes," which have similar characteristics because that section states that it "may incorporate fillers . . . and other substances cited under [liquids and pastes]." See *id.*

1890-1891

1891-1892

1892-1893

1893-1894

1894-1895

1895-1896

1896-1897

1897-1898

1898-1899

1899-1900

1900-1901

1901-1902

1902-1903

1903-1904

1904-1905

1905-1906

1906-1907

1907-1908

1908-1909

1909-1910

1910-1911

1911-1912

1912-1913

1913-1914

1914-1915

1915-1916

elsewhere, it cannot be included under a heading with language stating "not elsewhere specified or included"). See Pl.'s Brief at 13.²⁰

IV. Conclusion

For all the reasons set forth above, the EMCs at issue in this action are properly classified as "epoxide resins in primary forms," under subheading 3907.30.00 of the HTSUS. Amoco's motion for summary judgment is therefore granted – and the Government's cross-motion is denied – except as to those claims discussed in section II above, which are dismissed on the Government's cross-motion.

Judgment will enter accordingly.

²⁰ Because the EMCs are not classifiable under heading 3824, there is no need to reach the parties' arguments as to the proper subheading thereunder. See Pl.'s Brief at 13–17; Pl.'s Response Brief at 6–8; Def.'s Brief at 12–20; Def.'s Reply Brief at 7–9.

